Office - Supreme Court, U.S.
FILED
MAY 9 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1233

(3)

In The

Supreme Court of the United States

October Term, 1984

TRUCKEE-CARSON IRRIGATION DISTRICT,
Petitioner,

vs.

SECRETARY, DEPARTMENT OF THE INTERIOR,
Respondent.

vs.

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Respondent-Intervenor.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals and the District Court were correct in upholding the decision of the Secretary of the Interior to terminate the 1926 contract which permitted the Truckee-Carson Irrigation District to operate the Newlands Project, because of the District's repeated violations of the Secretary's operating criteria for the Project.

2. Whether the Secretary of the Interior has the authority to promulgate operating criteria for a federal reclamation project where the operating criteria simply quantify total project water entitlement in accordance with existing court decrees and insure that water diverted to the Project is used for beneficial purposes.

3. Is the Secretary of the Interior foreclosed from implementing regulations governing the operation of the Newlands Reclamation Project merely because the Truckee-Carson Irrigation District was not a party to the lawsuit which was the impetus for adoption of certain aspects of the regulations.

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STATEMENT OF THE CASE

The present controversy between the Secretary of the Interior ("the Secretary") and the Truckee-Carson Irrigation District ("TCID") concerns the termination of a 1926 contract between the Secretary and TCID ("the contract"). The contract allowed TCID to operate the Newlands Reclamation Project but retained in the Secretary full authority to regulate Project operations. TCID further agreed to fulfill a number of specific obligations. It has not done so, requiring the Secretary to wage a lengthy and so far unsuccessful battle to compel TCID to abide by its obligations to improve Project efficiency and to limit water use on the Project to decreed amounts. Under his retained contractual authority, the Secretary has promulgated rules and regulations governing Project operations. Those rules, found at 43 C.F.R., part 418 require the adoption of annual operating criteria. Because the District adamantly refused to abide by the Secretary's operating criteria for 1973, which, among other things, included a 350,000 acre-foot total diversion limit, the Secretary terminated the 1926 contract.

1. The Regulatory Scheme on the Truckee River

The Secretary's efforts to improve the operation of the Newlands Project stemmed from the fact that TCID was diverting more water than allowed by the *Orr Ditch* Decree and the *Alpine* temporary decree and that limiting project diversions to decreed amounts, as well as improvement in project operations would result in additional flows to Pyramid Lake for the benefit of its devastated fishery.[1]

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[1]Pyramid Lake is surrounded by the Pyramid Lake Paiute Indian Reservation which was set aside in 1859. One of the purposes of the Reservation "was to enable the Tribe to take

(Continued on following page)

The majority of the Newlands Project is located on the lower reaches of the Carson River. Distribution of Carson River water is controlled by the terms of the decree in *United States v. Alpine Land and Reservoir Company*, D-183 (D.Nev.).[2] That decree imposes an annual water duty per acre for the individual water users on the Project. That duty governs the amount of water which

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advantage of the Pyramid Lake fishery . . ." United States v. Truckee-Carson Irrigation District, 649 F.2d 1280 (9th Cir. 1981) at 1290, *modified* 666 F.2d 351 (1982) *aff'd in part and rev'd in part sub nom* Nevada v. United States, 463 U.S. 110 (1983). Pyramid Lake's principal fish, the Lahontan cutthroat trout and the cui-ui, are classified as threatened and endangered. 50 C.F.R. § 17.11(h) (1983); United States v. Truckee-Carson Irrigation District, *supra*, 649 F.2d at 1294. The cui-ui is not found any place else in the world, *id.*, 649 F.2d at 1290, and the restoration of both species is dependent upon obtaining more water for spawning flows and to maintain the level of the Lake. *Id.*, 649 F.2d at 1292-94, 1311-13; Carson-Truckee Water Conservancy District v. Watt, 549 F. Supp. 704, 710-711 (D.Nev. 1982), 748 F.2d 523 (9th Cir. 1984), *cert. denied*, 53 U.S.L.W. 368 (Mar. 26, 1985).

[2]That case was filed in 1926 and has now been finally decided. United States v. Alpine Land and Reservoir Company, 503 F. Supp. 877 (D.Nev. 1980) *aff'd* 697 F.2d 851 (9th Cir. 1983), *cert. denied sub nom* Pyramid Lake Paiute Tribe of Indians v. Truckee-Carson Irrigation District, 78 L.Ed.2d 170 (1983). During the controversy over the operating criteria, the 1949 *Alpine* temporary decree, imposed an average water duty to be delivered to the farmers' headgate on the Newlands Project of 2.92 acre-feet per acre. TCID was a party to that litigation and in fact agreed to the terms of the temporary decree. The final *Alpine* decree recognized higher duties for the farmers, parallel to those in *Orr Ditch*. See n. 2, *infra*.

TCID cites the *Alpine* decision as holding that there is no waste of water on the Project. But the decision did not address the question of the efficiency of Project operations. Instead, it merely defined the amount of water which the Project farmers were entitled to have delivered to their farm headgates. The district court refused to address any of the United States' concerns about the wasteful project operations which result in inordinately high conveyance losses on the Project.

must be delivered to the farmers' headgates for each acre of land actually under irrigation on the Project. It does not address the question of conveyance or storage losses on the Project. Nor does it contain an individual or a Project diversion limit from the River.

The Newlands Project also uses Truckee River water diverted at Derby Dam on the Truckee River and transported through the Truckee Canal to Lahontan Reservoir where it is comingled with water from the Carson River for delivery to the Project lands. A small amount of water passing through the Truckee Canal is diverted for use on bench lands located below the canal.[3] The Project's use of water from the Truckee River is controlled by the decree in *United States v. Orr Water Ditch Company*, In Equity No. A-3 (D.Nev. 1944).[4] The *Orr Ditch* decree specifies an upper limit for the flows which may be diverted to the Project based on the capacity of the Truckee Canal. It does not provide any guidance in terms of annual diversion limits for the Project. The decree also imposes a maximum water duty for each acre of Project lands. Because of the lack of meaningful limits on the diversion of water by TCID for use on the Project, the Department of the Interior published 43

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[3]A map of the area is included in the decision in Pyramid Paiute Tribe of Indians v. Morton, 354 F. Supp. 252 (D.D.C. 1973) at 259 (*"Tribe v. Morton"*).

[4]The *Orr Ditch* decree provides:

> The plaintiff [the United States] is entitled and allowed to divert, with a priority of July 2, 1902, through the Truckee Canal 1,500 cubic feet of water per second flow-in the Truckee River for the irrigation of 232,000 acres of land on the Newlands Project, . . . and under such control, disposal and regulation as the plaintiff may make or desire, provided that the amount of this water allowed or used for irrigation shall not exceed, after transportation loss and when applied to the land, 3.5 acre-feet per acre for the bottom lands, nor 4.5 acre-feet per acre for the bench lands.

C.F.R. part 418 in February 1967 to "initiate Departmental controls, lacking in the past, to limit diversions by TCID from the Truckee River within decreed rights and thereby make additional water available for delivery to Pyramid Lake."[5] 43 C.F.R. 418.1(b). The Secretary's regulations called for the establishment of annual operating criteria, which *inter alia* were to include diversion limits premised on the amount of water needed to provide the water duties found in the *Alpine* and *Orr Ditch* decrees to the water right acreage on the Project actually being irrigated in any given year. The operating criteria thus were to fulfill the requirement in the *Orr Ditch* decree for the imposition of Secretarial regulations governing Project diversions.

2. The History of the Operating Criteria

The present efforts to improve water use on the Project began in 1964, when Secretary Udall created a task force to address the problems of water use in the Truckee and Carson Basins. Tribe's Supplemental Excerpt of Record ("Tr. ER") 1. The Secretary published 43 C.F.R., part 418 to establish Departmental regulatory control over the Project in accordance with the terms of the *Orr Ditch* decree and the 1926 contract. The regulations established a comprehensive process for improving Project operations and went beyond imposing a diversion limit. The relevant terms of the regulations:

(1) mandated that "District operation of the irrigation works, including the diversion of water, shall be in compliance with all of the terms and pro-

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[5]The regulations had been published as proposed in August, 1966, 31 Fed. Reg. 113-14 (1966), and the Department of the Interior had held extensive discussions with the District concerning their substance. *See, e.g.*, Trial 1-30.

visions of the Truckee River Decree and the Carson River Decree . . .";

(2) established a committee to propose annual operating criteria for the coordinated operation of the Carson and Truckee Rivers;

(3) established a procedure for choosing an advisory committee of affected water users (which was to include a representative of TCID);

(4) imposed an upper limit of 406,000 acre-feet for the Newlands Project's annual diversions; uncontrollable spillage and evaporation from Lahontan Reservoir was not counted against this total;

(5) required certain measurements to be made by the District "through facilities and by methods satisfactory to the Secretary of the Interior . . .";

(6) stated that the United States may store water for the District in upstream facilities;

(7) prohibited the release of water from Lahontan Reservoir for single purpose power.

In 1967 the Secretary began issuing annual operating criteria. In 1970, the Pyramid Lake Tribe filed suit challenging the operating criteria for the upcoming water year.[6] Eventually, the District of Columbia court directed the Secretary to submit new criteria for the 1973 water year, which criteria were (1) to provide for an effective means to measure water use, (2) to minimize unnecessary waste, (3) to ensure the delivery of water only to water right land, and (4) to give proper weight to both the *Orr Ditch* decree and the *Alpine* temporary decree. *Tribe v.*

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[6]In its petition, TCID suggests that the filing of this litigation was the triggering event in the Secretary's efforts to control practices on the Project. But the Secretary had been engaged in such an effort for quite some time and had been in constant communication with the District about his plans. The litigation filed by the Tribe simply sought to compel the formulation of operating criteria which complied with the previously published regulations.

Morton, supra, 354 F. Supp. at 260. In addition, the district court ordered that the criteria include methods to ensure compliance.

On December 22, 1972, the Secretary prepared and submitted new criteria to the District of Columbia court. The criteria provided for:

(1) a maximum diversion of 358,000 acre-feet;
(2) sufficient water to irrigate 60,500 acres of land;
(3) the utilization of Stampede Reservoir to provide TCID with upstream storage on the Truckee River;
(4) an improved measurement scheme for farm turnouts and the outflow from the project;
(5) the establishment of a central water operations center to coordinate the delivery of water;
(6) a restriction on annual deliveries to the Carson Division to 3.5 acre-feet per acre;
(7) only authorized District employees to open and close turnouts and the distribution system.

Tr. ER 132.

The Tribe objected to the proposed criteria, primarily because the 2.92 acre-feet per acre water duty in the *Alpine* temporary decree was ignored and no provision was included which would provide financial incentives for the economical use of water. Tr. ER 154. The Tribe also questioned whether adequate compliance provisions were included. *Id.* The Tribe suggested that the criteria be amended to:

1. Establish a maximum diversion of 288,129 acre-feet. That limit was derived using the 2.92 acre-feet per acre diversion requirement in the *Alpine* temporary decree for 75% of the Carson division and a reduction to take account of the 5,000 acres of non-water right land being irrigated;
2. Establish a system for charging water users for the quantity of water used;

3. Add provisions to ensure compliance.

Tr. ER 187-197.[7]

Otherwise, the Tribe's proposed criteria were nearly identical to those prepared by the Secretary. *Compare* Tr. ER 132-139 *with* Tr. ER 198-210. Subsequently, the court asked the Secretary to comment on the Tribe's suggested provisions.

On February 20, 1973, the *Tribe v. Morton* court issued a supplemental order approving operating criteria contained in its order. The criteria which the court found acceptable directly reflected the comments of the Secretary. *See* Tr. ER 245-250. The Secretary had recommended a 350,000 acre-foot diversion limit for 1973 which was adopted. In addition, the portion of the criteria addressing compliance took account of the Secretary's view that he should not be compelled to terminate the contract in case of breach, but should be allowed to select the appropriate course of action only after all alternative were considered. *Compare* 354 F. Supp. 262-266 *with* Tr. ER 198-210. Section C of the criteria included the provisions from the Secretary's December criteria but added the Tribe's suggestion to establish a system for charging water users for the amount of water used.[8] The Secre-

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[7]The District commented on the criteria proposed by the Tribe in a letter to the Secretary's representative. Tr. ER 211.

[8]The 1926 contract formed the foundation for virtually all of the provisions of Section C of the operating criteria violated by the District and challenged below as outside the scope of Secretarial power. Paragraphs 7 and 34 recognized the Secretary's right to issue rules and regulations. Paragraph 13 established that the pricing system may be based on the amounts of water delivered. Paragraph 14 prohibited the delivery of water to non-water right land. The District was required by paragraph 20 to measure and keep records of water deliveries and to submit whatever reports are required by the Secretary. Paragraph 35 recognized the controlling nature of the *Orr Ditch* and *Alpine* decrees. App. A-47-88.

tary, consistent with the court's order, announced his intention for the following water year of 1974 to approve an annual limit of 288,129 acre-feet.[9] For 1974, he also included detailed procedures concerning the diversion of Truckee River water to Lahontan Reservoir.

The Secretary, of course, was free to appeal the *Tribe v. Morton* decision. Initially, the Department of the Interior recommended a limited appeal, but ultimately the federal government decided not to appeal anything other than the award of attorneys fees.[10] On Monday, March 12, 1973, the suggested criteria were published in the Federal Register.

TCID, rather than challenging the operating criteria through appropriate channels, simply refused to comply with them. TCID admitted delivering water to non-water right lands, allowing non-TCID employees to operate turnouts, failing to develop an adequate measuring sys-

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[9]The critical factor in the derivation of the 288,129 figure was the 2.92 acre-feet per acre water duty contained in the temporary decree in *Alpine*. The principle conflict in the *Tribe v. Morton* litigation was over the application of that limit. *See, e.g.*, 354 F. Supp. at 258. The United States and TCID were parties to the *Alpine* case and both were obligated to follow the terms of the temporary decree. "[P]ersons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the Order." GTE Sylvania, Inc. v. Consumers Union, 445 U.S. 375, 386 (1980).

[10]TCID argues, based on an April 30, 1973 letter from a staff attorney at the Department of Justice, that the Government's decision not to appeal was made by the Department of Justice and that the failure to appeal cannot be characterized as an "adoption" of the criteria. The record, however, does not demonstrate that the Secretary disagreed with the decision of his lawyers. Moreover, the Department of the Interior was not concerned with the criteria applicable in 1973, App. A-106, but was only concerned with the jurisdictional question of whether TCID was an indispensable party and the impact of the 1974 criteria which applied the *Alpine* limit. It willingly adopted the 1973 citeria. App. A-106-107.

tem, failing to charge for the amounts of water actually delivered and diverting water substantially in excess of the quantities allowed by the criteria. The court below specifically found that "TCID made no effort to reduce the diversion of water and comply with the operating criteria." The Secretary sent two compliance reports to TCID, which ignored them.

3. Termination of the Contract

On September 14, 1973, the Secretary notified TCID that, pursuant to Article 32, the 1926 contract would be terminated as of October 31, 1974. App. A-109. The letter cited the repeated violations of the criteria by TCID, specifically referring to excess diversions in June and September, which were admitted by TCID to have been in violation of the criteria. The Secretary also referred to TCID's August 21, 1973 letter which admitted its failure (1) to halt delivery water to non-water right land, (2) to establish a central water operations center, and (3) to establish an adequate measurement program. The Secretary's letter specifically cited the repeated efforts by the Department to advise the District of its concerns.

4. The Proceedings Below

TCID brought this action in March of 1974 to challenge the Secretary's decision to terminate the 1926 contract. The proceeding was held in abeyance pending resolution of *Alpine* and *Nevada v. United States, supra.* After a four day trial, the district court declared "that the Secretary of the Interior has legally terminated the contract dated December 18, 1926, and has a lawful right to possession and control of the Newlands Reclamation Project effective as of November 1, 1974." App. A-32. In reaching this decision, the District Court made a number of critical factual findings now overlooked by TCID.

First, the District Court found that the testimony of TCID's own project manager substantiated the statement in its complaint that TCID "has refused and continues to refuse to comply with the so-called 'operating criteria' . . ." App. A-13. As stated by the District Court, "Richard Lattin, a member of the Board of Directors of TCID, appeared on behalf of TCID and testified to numerous violations of the operating criteria." *Id.* These violations included the delivery of water to non-water right lands, allowing non-TCID employees to operate turn outs, failing to develop an adequate measurement system, failing to charge for the amounts of water actually delivered, and diversions in excess of the quantities allowed by the criteria. The District Court also found that the administrative record substantiated TCID's violations of the criteria. App. A-14. The court specifically held that "TCID made no effort to reduce the diversion of water and comply with the operating criteria." *Id.* In addition to the excess diversions, the court found that the administrative record substantiated the violations of Section C of the criteria noted by its project manager and that TCID failed to submit the monthly reports required by the criteria. App. A-14. Finally, the court noted that the Secretary sent two compliance reports to TCID which failed to heed the warnings. App. A-14.

Second, the District Court reviewed the validity of the operating criteria and concluded that "TCID has provided no evidence which would indicate that relevant factors were not considered or that the criteria approved by the court were clearly errors of judgment." App. A-24. The court denied TCID's claim that the Administrative Procedure Act, 5 U.S.C. §§ 701-706, was violated and found the criteria to be "valid and enforceable" regulations. App. A-29. Finally, the District Court found the operating cri-

teria to "clearly fall within the ambit of Secretarial power to prescribe rules and regulations under the 1926 contract." App. A-30.

The Court of Appeals affirmed. The appellate court concluded that the Secretary acted within his authority when he terminated the 1926 contract. The Court of Appeals also examined the operating criteria and found them to be neither arbitrary nor capricious. In the view of the court it was unnecessary to go beyond TCID's admitted violation of the diversion limits to justify the Secretary's decision to terminate the 1926 contract. Finally, isasmuch as the result of termination was simply to terminate TCID's management of the Project, the Court of Appeals found that the question of the impact of the criteria on project landowners raised no due process concerns.

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REASONS FOR DENYING THE WRIT

This case, contrary to TCID's representations, does not diminish in any way the water rights of the Project farmers decreed in *Orr Ditch* and in *Alpine*. Neither does this case "unsettle" any rights confirmed in *Nevada v. United States*, since the challenged criteria simply govern the amount of water which must be diverted to provide Project farmers with the water duties established by those decrees. Instead, the sole issue in this case is whether the Secretary acted properly in terminating the 1926 contract as a result of TCID's repeated violations of the operating criteria. None of the reasons suggested by TCID merit review by this Court of the decision which was correctly decided and which has no impact other than precluding TCID from operating the Project under the now terminated 1926 contract.

I. The Decision Below Is Fully Consistent With Nevada v. United States And Does Not Adversely Affect The Rights Recognized In Orr Ditch And Alpine.

TCID is misleading in claiming that the operating criteria "indisputably invade and drastically reduce" the farmers' *Orr Ditch* rights and that the Ninth Circuit's decision has "reinstate[d] the same decision which this Court reversed in *Nevada.*" In fact, the operating criterit do not diminish the Project farmers' water duty at all, and the Ninth Circuit's decision has no effect on the rights to appropriated water recognized in *Nevada v. United States.*

TCID would have this Court believe that, because the operating criteria result in reducing the amounts of water diverted below historical quantities and causing more water to reach Pyramid Lake, the Project farmers' water rights are somehow being invaded. The *Orr Ditch* and *Alpine* decrees establish the farmers' water duties; *e.g.*, the maximum amounts of water which may be delivered to each acre of water right land on the Project. The operating criteria do not affect this water duty; they only determine the maximum volume of water that may be diverted to provide the required water duties. Prior to the operating criteria, TCID had diverted far more water than was necessary to satisfy the farmers' *Orr Ditch* rights. The operating criteria were intended to reduce the volume of water diverted but in no way were designed to diminish the farmers' water duty.

The fact that reduced diverisons would result in more Truckee River water flowing into Pyramid Lake does not mean that the Tribe is receiving "ten times the amount [of water] awarded the tribe in *Orr Ditch.*" TCID Peti-

tion at 14. Rather, as the terminus of the Truckee River, Pyramid Lake is the indirect beneficiary of the Secretary's decision to hold the farmers to no more than their *Orr Ditch* rights. Water which is not diverted then becomes unappropriated water which flows to Pyramid Lake.[11]

Both the District Court and the Court of Appeals held that the operating criteria are consistent with the decrees in *Orr Ditch* and *Alpine*.[12] The *Tribe v. Morton* court explicitly recognized that the criteria implemented by the Secretary could not interfere with the rights recognized in the *Orr Ditch* and *Alpine* decrees. 354 F. Supp. at 260. *See also* App. A-6, n. 2. The District Judge in this case specifically found that the *Orr Ditch* decree permitted the Secretary to impose regulations which limited the District's diversions from the Truckee River, as long as Project farmers receive the water duties to which they are entitled.[13] App. A-23-24. The Court of Appeals affirmed. App. A-6, A-9.

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[11]The footnote to the concurring opinion in Nevada v. United States, *supra*, states that the Tribe retains its *Winters* rights in this unappropriated water.

[12]As previously noted, at the time the 1973 operating criteria were in effect, the water duty on the Carson River was governed by the temporary decree which provided an average of 2.92 acre-feet per acre on the Newlands Project. The final decree recognized higher limits which parallel those in the *Orr Ditch* decree. Accordingly, the United States is now in the process of modifying the operating criteria to reflect the revised water duty as well as any additional information about the Project which may have surfaced. As a result, it is unlikely that the 1973 criteria about which TCID is now so concerned will ever be enforced agains the Project farmers. As TCID points out, any modifications to the criteria will have to be approved by the *Tribe v. Morton* court, which has now transferred that case to the District of Nevada.

[13]It is worth noting that Judge Thompson, who decided this case, is the same judge who decided *Alpine* and who wrote the final decree in that case. In addition, for many years

The 1973 criteria certainly did not infringe on the rights of the individual Project water right holders. Although TCID continues to complain about the diversion limits in the 1973 criteria, its project manager testified at trial that adherence to the 1973 criteria at the efficiency levels achieved in 1973 would have permitted substantially more water to be delivered to Project farmers than in previous years.[14]

TCID's only basis for contending that the 1973 criteria detrimentally affected the water rights of Project farmers is the subsequent recognition of a slight increase in water duty in the *Alpine* final water duty. But, unquestionably, the lower 2.92 acre-feet per acre duty represented a valid and binding court order during 1973 and 1974 when the criteria were in effect. The Secretary cannot be criticized for implementing criteria which recognized the provisions of the *Alpine* temporary decree. If TCID was dissatisfied with the provisions of the temporary decree in *Alpine*, it was free to move for a modification of those provisions to which it had previously agreed.

In short, the record simply does not support TCID's bald assertion that the 1973 operating criteria infringed on the farmer's water rights recognized in the *Alpine* and *Orr Ditch* decrees and confirmed in *Nevada v. United States, supra.* Instead, it is aboundantly clear that the

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Judge Thompson was responsible for administering the *Orr Ditch* decree. His views on this matter, as one extremely familiar with both of those decrees, should be entitled to considerable weight.

[14]According to TCID's Project Manager, Mr. Lattin, TCID's actual efficiency level in 1973 would have permitted TCID in 1973 to deliver to its farmers at their headgates approximately 7,000 acre-feet more water than it had in the previous two years and 13,000 acre-feet more than the average for the past 12 years. RT 86.

criteria were premised on the water duty established in *Alpine* and *Orr Ditch*. As a result, TCID's imagined conflict between *Nevada v. United States, supra,* and the decision below simply does not exist. *Nevada* merely confirmed the *Orr Ditch* rights awarded to Project farmers; it did not grant unlimited and unrestricted rights to divert water from the Truckee River, nor did it destroy the Secretary's obligation to limit TCID diversions to decreed amounts.

II. The Decision Below Does Not Affect The Substantive Rights Of The Newlands Project Farmers.

TCID is also incorrect in claiming that the Ninth Circuit's decision conflicts with *Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333 (1977), because the Court of Appeals held that TCID lacked standing to assert the water rights of the Project farmers. This assertion is flatly wrong because only TCID's right to operate the Project, not the farmers' rights to water, are in issue in this case.

As pointed out above, the Ninth Circuit's decision upholding the operating criteria in no way diminishes any vested water rights of Newlands Project farmers under the *Orr Ditch* and *Alpine* cases. Even assuming such infringement, however, these rights are not in issue in this case. Rather, the issue is TCID's right to operate the Newlands Project in light of the Secretary's termination of the 1926 contract. Whether or not TCID operates the Project, the rights of the farmers remain precisely the same as before. The farmers arguably retain a right to challenge the operating criteria if the Secretary's operation of the Project infringes on their decreed rights. Thus, the question of the impact of the criteria on the farmers' rights causes no constitutional concern.

TCID's reliance on *Hunt* for a contrary position is misplaced. In *Hunt,* this Court held that a state agency established to promote a particular industry had standing to represent members of the industry where the members' rights were in issue. Here, in contrast, the question of the rights of the Newlands farmers are not before the Court. The sole question is whether TCID should be allowed to operate the Project subsequent to TCID's flagrant breach of the Secretary's criteria. Accordingly, *Hunt* has no bearing on this action.

III. The District Court And The Court Of Appeals Correctly Held That The Criteria Were A Valid Exercise Of The Secretary's Authority.

TCID consistently ignores the fact that both the District Court and the Court of Appeals scrutinized the operating criteria. Indeed, the district judge devoted a considerable portion of his opinion to the question of the validity of operating criteria and found them to be a proper exercise of secretarial authority. He specifically found that the criteria, including the diversion limits, were consistent with the *Orr Ditch* decree and concluded that "relevant factors were considered and that no error of judgment was made." App. A-23-24. Although the district judge reviewed the criteria under the standards of *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 416 (1971), he conducted a trial *de novo* over the objections of the Tribe and the United States, who contended that the evidence should have been limited to the administrative record. Despite being given such a free hand, TCID was unable to convince the District Court that the criteria were improper or outside the scope of Secretarial power. The Court of Appeals affirmed. App. A-9.

The lower courts were correct. The provisions of Section C of the criteria—which TCID admitted violating —are aimed at improving efficiency on the Project and directly implement the terms of the 1926 contract, virtually tracking that agreement word-for-word. Even a cursory glance at the language of the *Orr Ditch* decree, which contains only a water duty for each acre and no diversion limit, reveals the absolute necessity for the secretarial regulations which *Orr Ditch* expressly authorizes. As the District Court found, a limit on diversions is necessary if there is to be any restraint on the water diverted by TCID. App. A-24. The results of TCID's refusal to follow the 1973 criteria confirm the need for such restrictions. During the pendency of this litigation, TCID's disregard of the 1973 criteria resulted in an average annual loss of over 46,000 acre-feet of water because of spills, unnecessary releases, and unnecessary evaporation which would not have occurred if the 1973 criteria had been in effect. *See* Exh. 3 to the Tribe's opposition to TCID's Request for a Stay Pending Appeal before the Ninth Circuit.

TCID argues that the criteria, even if properly promulgated, exceeded the Secretary's authority to the extent that Project diversion were limited.[15] Neither of the lower courts were persuaded by TCID's complaints that the Secretary was not authorized to limit project diversions. First, such an argument flies directly in the face of the language of the *Orr Ditch* decree which expressly provided for secretarial regulation. Likewise, the Secretary explicitly reserved the right in paragraph 34 of the 1926

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[15]TCID makes no mention of the other portions of the criteria which it violated and apparently concedes, as it should, the Secretary's authority to impose such requirements.

contract to issue rules and regulations governing the operation of the Project.

The reclamation laws authorize the Secretary to enter into contracts with water users' associations such as TCID to permit such districts to take over the operation and maintenance of project facilities. *See* Section 4(G) of the Fact Finders Act of December 5, 1924, 43 Stat. 702, 43 U.S.C. § 500. These laws vest broad discretionary authority in the Secretary to negotiate, administer and enforce the terms and provisions of these contracts. They also require the Secretary to promulgate and enforce rules and regulations to ensure the beneficial use of water on the projects.

In promulgating 43 C.F.R., part 418, the foundation for the challenged 1973 criteria, the Secretary did not simply rely on his authority under reclamation law, but also referred to his fiduciary obligations to the Pyramid Lake Tribe, *see, e.g., United States v. Mitchell,* 103 S.Ct. 2961, 2972 (1983) and his responsibilities under the Washoe Project Act of 1956, 43 U.S.C. § 614 *et seq.,* to restore the Pyramid Lake fishery. *See United States v. Truckee-Carson Irrigation District, supra,* 649 F.2d at 1311-12; *Carson Truckee Water Conservancy District v. Watt, supra,* 549 F. Supp. at 707.[16] These authorities provide ample support for the criteria which TCID now challenges.

TCID seeks to avoid the Secretary's obligations outside of reclamation law by reference to the decision in *Nevada v. United States, supra,* claiming that that decision eliminates the Secretary's obligation to the Tribe to ensure that water uses and methods of operation on the

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[16]If those regulations were promulgated today, the Secretary would also need to consider his obligations under the Endangered Species Act, 16 U.S.C. § 1532 et seq.

Project are reasonable and do not result in the excessive use of water. But *Nevada v. United States* does not eliminate the Tribe's or the federal government's interest in seeing that users of Truckee River water do not exceed their decreed entitlements. As the Tribe's trustee, the Secretary was responsible for protecting the Tribe's interests. The fact that this Court held that res judicata barred the Tribe from claiming rights with a priority over TCID's rights does not mean TCID has a right to divert water free from any limits or that the Secretary need not act to limit TCID's diversions to reasonable amounts and to require efficient operation of the Project.[17]

IV. TCID's Argument That The Operating Criteria Were Fatally Flawed Because TCID Was Not A Party To Tribe v. Morton Is Specious.

Having failed to persuade any of the four judges who reviewed the matter that the 1973 criteria exceeded the permissible scope of Secretarial authority or reflected an error of judgment, TCID now argues that the circumstances surrounding their adoption by the Secretary rendered them fatally flawed, whatever the merits of their content. TCID contends that the *Tribe v. Morton* court overstepped its bounds in "formulating" the 1973 criteria "adopted" by the Secretary rendering the criteria "void." TCID Petition at 19. TCID next argues that, despite the scrutiny of the criteria in the present case, requiring TCID to abide by criteria stemming from *Tribe v. Morton* would violate due process since TCID did not participate in that

[17]Subsequent to the decision in Nevada v. United States, this Court recognized the Tribe's continuing interest in limiting the use of water on the Newlands Project when it permitted tribal intervention to seek a writ of certiorari in *Alpine*. Pyramid Lake Paiute Tribe of Indians v. Truckee-Carson Irrigation District, 78 L.Ed.2d 170 (1983).

litigation. The courts below properly found no basis for those contentions.

First, TCID seriously mischaracterizes the proceedings in *Tribe v. Morton*. Contrary to TCID's argument, the criteria adopted by the Secretary reflected his views on the subject. As the record below clearly shows, *see* pp. 6-8, *supra*, it was the Secretary who first suggested virtually all of the provisions found in the 1973 criteria approved by the *Tribe v. Morton* court. The provisions of the 1973 criteria merely implement the Secretary's concerns set forth in the 1967 regulations. It is undisputed that the Secretary first included in the criteria the provisions in Section C that water only be delivered to water right land, that TCID establish a single water operations center, that only TCID employees open and close turnouts, that outflow from the Project be measured, that measurements on the Project be improved, and that a monthly report be provided. *See* Tribal ER at 100. The district judge in this case found that TCID had violated each of those provisions. App. A-13, 14.

The only place in the criteria where the imprint of the *Tribe v. Morton* court is reflected at all is in the diversion limits. The court determined, contrary to the Secretary's position that as a matter of law the Secretary was required to give effect to the *Alpine* temporary decree. *See* 354 F. Supp. at 257-58. But that only affected the post-1973 criteria; the 1973 criteria reflected the 350,000 acre-feet developed by the Secretary as a transition limit. 354 F. Supp. 261; Tr. ER 246. Moreover, the diversion limit depended directly on the resolution of the legal question of the applicability of the *Alpine* decree. The district court, under 5 U.S.C. § 706, was entitled to "decide all relevant questions of law" and "compel agen-

cy action unlawfully withheld . . . ." *See Northeast Marin Terminal Co. v. Caputo,* 432 U.S. 249 (1977); *Newport News Shipbuilding and Dry Dock Co. v. E.E.O.C.,* 103 S.Ct. 2622 (1983).

At any rate, this case involves a challenge to the termination of the 1926 contract. The District Court plainly held that the Secretary decided to terminate the contract and that he was not compelled to terminate by the terms of the operating criteria. TCID's contrary assertion here that the District Court found that the *Tribe v. Morton* court mandated the Secretary's decision to terminate is extremely surprising, *see* TCID Petition at 20, since before the Court of Appeals TCID expressly sought to overturn the District Court's determination that the Secretary decided to terminate the contract, calling the District Court's statements to that effect "nothing short of fanciful." TCID Brief before the Court of Appeals at n. 21. Before the Court of Appeals, TCID stated "Implicit in the district court's decision is a factual determination that the Operating Criteria and their enforcement were the product of an exercise of Secretary discretion and are therefore reviewable as administrative acts." *Id.* It is obvious that the District Court held that the Secretary decided to terminate the contract and that the record fully supports that holding. App. A-11; App. A-14; App. A-24; App. A-32.

In fact, the Secretary did not terminate the contract at TCID's first violation, but took that step only after TCID repeatedly violated the criteria. Furthermore, the Secretary surely did not believe he was compelled by court-imposed criteria to terminate the contract since he considered other options before deciding to invoke paragraph 32 of the contract. ER 351-359, 375-378. TCID's

"attitude of complete defiance" left the Secretary with no choice but to terminate the contract. App. A-31.

Stated succinctly, TCID's argument fails because its underlying premise is incorrect; the *Tribe v. Morton* court simply did not dictate the terms of the 1973 criteria as TCID contends. The criteria set forth in the court's order are the product of a lengthy process, conveniently ignored by TCID, in which the Secretary, under the court's supervision, finally came to recognize the proper scope of his responsibilities on the Truckee River.

Even assuming that some foundation exists for TCID's concerns with the actions of the *Tribe v. Morton* court, TCID may not now mount a collateral attack on that decision. TCID's contentions, if accepted, would permit any entity subject to regulations published after judicial review to challenge those regulations on the ground that the reviewing court acted improperly, whether or not the resulting regulations themselves were improper or outside the scope of the agency's authority. As the Court of Appeals noted, the Secretary was the one to contest the actions of the *Tribe v. Morton* court. App. A-8. By not appealing the trial court's decision in that case, the Secretary effectively adopted the outcome as his own. Neither the District Court nor the Court of Appeals foreclosed TCID from attacking the criteria. Both held, however, that the criteria withstood TCID's challenges.

Unable to upset the criteria on their merits, TCID now demands more. The District argues that it should be allowed in this case to attack the decision in *Tribe v. Morton,* as exceeding the jurisdiction of that court. TCID could have intervened in *Tribe v. Morton,* or it could have moved to set aside the temporary decree in *Alpine,* given its dissatisfaction with the criteria's reliance on the water

duty in that decree. It did neither, but instead seeks in this case to determine whether the *Tribe v. Morton* court exceeded its authority. Without discussion, TCID cites to *United States v. SCRAP,* 412 U.S. 669 (1973); *Arrow Transportation Co. v. Southern R.R. Co.,* 372 U.S. 658 (1963); and *Cherokee Nation v. State of Oklahoma,* 461 F.2d 674, 681 (10th Cir. 1972), *cert. denied,* 409 U.S. 1039 (1972), as support for its novel position. These cases, however, do not stand for the proposition that a party may invalidate regulations which arose out of litigation on the grounds that the reviewing court exceeded its authority under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* Rather than condoning a collateral attack on the outcome of litigation, those cases all involved a direct attack on the court actions in question, raised by parties to the actions: TCID has cited no authority for its unique proposition that one who is not a party to litigation may in a subsequent case raise the question whether in the previous litigation, a court exceeded its authority in supervising the promulgation of regulations.

The *Tribe v. Morton* decision represented a final and binding resolution of the controversy between the Secretary and the Tribe concerning the scope and content of the Secretary's criteria for the operation of the Newlands Project. Neither party appealed and neither party may avoid the outcome. TCID contends that, nevertheless, it is free in this case to nullify the *Tribe v. Morton* decision if, in fact, that court overreached its authority in directing the promulgation of regulations consistent with the Secretary's fiduciary obligations to Tribes.[18] To the con-

[18]It may be that the Tribes' failure to join TCID in *Tribe v. Morton* and the Government's refusal to appeal the district

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trary, this Court has always been extremely protective of the right of courts to ensure that their decisions are not upset by the actions of third parties. For example, the Court has endorsed the use of injunctive powers against third parties where the actions of those parties interfered with the implementation of court orders establishing public rights. *Washington v. Washington State Commercial Passenger Fishing Vessel Association,* 443 U.S. 658, n. 32 (1979), upheld the district court's actions in enjoining individual fishermen who were not parties to its decisions from interfering with the implementation of the decision. In *United States v. Hall,* 472 F.2d 261 (4th Cir. 1972), cited with approval in *Fishing Vessels Association* and *Golden State Bottling Co. v. NLRB,* 414 U.S. 168 (1973), the Court refused to overturn the district court's use of its contempt powers against a nonparty whose actions interfered with the implementation of the court's school desegregation orders. *See also United States v. United Mine Workers,* 330 U.S. 258, 293

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court's refusal to dismiss as a result of that failure means that TCID is not precluded from challenging the criteria themselves rather than the judgment in *Tribe v. Morton.* Although not addressed by the Ninth Circuit, a strong argument exists that TCID is in privity with the Secretary and thus is foreclosed from challenging the criteria at all. In Nevada v. United States, *supra* this Court held that the effect of the earlier adjudication in *Orr Ditch* barred the United States and the Pyramid Lake Tribe from asserting a fishery water right with an 1859 priority date against Newlands Project farmers, *Orr Ditch* water right holders and subsequent appropriators who had relied on the *Orr Ditch* decree. The Court stated "TCID, like the Tribe, stands with respect to that litigation in privity with the United States." 77 L.Ed.2d at 529. The Court thus concluded that the Tribe and the Project landowners, although neither were parties, were bound by the final decree in *Orr Ditch.* Similarly, TCID should be precluded from challenging the decision in *Tribe v. Morton,* since it is in privity with the Secretary by virtue of the 1926 contract.

(1947). A refusal to invalidate the 1973 criteria because TCID did not participate does not begin to approach the limits suggested by those cases since TCID was allowed to attack the criteria on their merits.

The lower courts were correct in refusing to endorse TCID's challenge in this case to the *Tribe v. Morton* court's supervision of the promulgation of the criteria. TCID's concerns with the actions of that court should have been raised in that forum. This Court's holding in *GTE Sylvania, Inc. v. Consumers' Union,* 445 U.S. 375 (1980), is instructive in this regard. In *Sylvania,* this Court held that the Consumer Product Safety Commission was not "improperly" withholding information under the Freedom of Information Act since it was subject to an injunction, in another case, barring disclosure. The requesters in *Sylvania* contended, *inter alia,* that the CPSC could not rely on that court order since the requesters had not been parties to that case. This Court reasoned:

> The conclusion that the information in this case is not being "improperly" withheld is further supported by the established doctrine that persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order . . . There is no doubt that the Federal District Court in Delaware had jurisdiction to issue the temporary restraining order and preliminary and permanent injunctions. Nor were those equitable decrees challenged as "only a frivolous pretense to validity." *Walker v. City of Birmingham* [388 U.S.] at 315, although of course there is disagreement over whether the District Court erred in issuing the permanent injunction. 445 U.S. at 386. (citations and footnote omitted).

That same reasoning applies here. The Secretary had no choice but to implement regulations consistent with the

orders of the *Tribe v. Morton* court. TCID, like the requesters in *Sylvania,* was burdened by the outcome of a suit in which it did not participate. TCID's recourse, if it did not agree with the Secretary's actions in *Tribe v. Morton,* was to intervene in that action, not, to ignore the Secretary's criteria. *See O'Burn v. Shopp,* 70 FRD 549, 552 (E.D. Pa. 1976), *aff'd. mem.* 546 F.2d 418 (3d Cir. 1976), *cert. denied,* 430 U.S. 968 (1977) ("We cannot accept plaintiffs' proposition that *Hansberry* allows any third person an unqualified right to collaterally relitigate the merits of a judgment in a prior suit. Under such circumstances, courts could never enter a judgment in a lawsuit with the assurance that the judgment was a final and conclusive determination of the underlying dispute.").

TCID is also mistaken regarding its assertions that the promulgation of the criteria denied it due process. TCID vehemently criticizes the Court of Appeals for failing to consider the potential impact of the criteria on the rights of the individual farmers. TCID again ignores the fact that its own testimony was that the criteria provided the farmers with more water than they had received in past years.

Even assuming *arguendo* that the criteria adversely affected the farmers, the Court of Appeals was correct in refusing to address TCID's due process concerns in the framework of the individual landowners water rights. Before the Court of Appeals, TCID argued only that "Termination of TCID's operating contract constituted enforcement of a court order against a non-party in violation of due process of Law." TCID's concern was that the *Tribe v. Morton* court had mandated termination and, thus, that the Secretary's actions were, in effect, the enforcement of a court order against a party who did not participate in the litigation. Brief of Truckee-Carson Ir-

rigation District, Appellant at 17, 22. As previously pointed out, the District Court found that the Secretary had decided to terminate the contract. Given the fact that TCID only challenged on due process grounds the termination decision, the Court of Appeals found it unnecessary to address the question of whether the criteria unconstitutionally infringed on the farmers' rights. The court reasoned that since the only enforcement actions taken by the Secretary, *i.e.*, termination of the 1926 contract, did not affect the individual farmers whose water rights remained precisely the same as before, the question of the impact of the criteria on the farmers' rights raised no constitutional concerns vis-a-vis TCID. Thus, TCID was entitled to no more than an *Overton Park* review of the criteria and their impact on the farmers.

As its last gasp, TCID argues that both the District Court and the Court of Appeals misinterpreted the Truckee River Agreement ("TRA") and that this Court should accept this case to review that narrow question concerning the administration of the Truckee River. The lower courts were correct in rejecting this novel interpretation of the TRA which would render meaningless the detailed provisions of the *Orr Ditch* decree. The testimony at trial was that no other entity interprets the TRA in the fashion that TCID requests. RT 319-21. Moreover, that interpretation is not even utilized by the District in its day-to-day operation of the Project. RT 93-94.[19]

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[19]A far more viable interpretation of Article VII of the TRA is readily apparent. That interpretation centers on the fact that among the parties to the TRA who take water under Article VII, the TCID diversions at Derby Dam for the Newlands Project are

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farthest downstream. Hence, Article VII (A)(2) is intended sim-

CONCLUSION

In conclusion, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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ply to permit TCID to divert that water which, for whatever reason, is not utilized by the upstream signatories and is needed on the Project to meet decreed rights. Quite obviously, the upstream users cannot divert that water once it reaches as far downstream as Derby Dam. The accomplishment of that limited objective does not require the rejection of the provisions of the *Orr Ditch* decree or the suspension of federal reclamation law or state law requiring that water only be diverted for beneficial uses. Likewise, that interpretation does not necessitate the conclusion that the Secretary lacks authority under the 1926 contract to regulate the use of Project facilities for the delivery of that water.